waste.[17] But this is due no doubt to the wife's incapacity at common law to sue her husband, and now even after statutory emancipation this long-established privilege of the husband would probably continue on grounds of policy. But the grantee of the husband would not be protected by any such procedural bar or by considerations of domestic welfare.

Although in the principal case the court expressed itself strongly against enjoining waste, the case was fortified by the fact that the grantee was merely committing ameliorating waste.[18] In the case of a life estate or executory devise the courts will enjoin only equitable waste,[19] that is, a use beyond what a prudent manager would do with his own property. As the wife's interest is certainly no more substantial than these estates, the principal case may be supported because of the absence of equitable waste. However, as dower differs from other cases in that it arises by action of law rather than the intent of the parties, it may be that the policy of the law which creates it would favor protection from legal waste as well. Whatever may be the final result, the two cases that have arisen certainly would not go to this extent.[20]

THE TAXING POWER AND THE JURISDICTION OF THE COURTS. — That judicial tribunals in the absence of statute are without jurisdiction themselves to exercise the taxing power has again been demonstrated in a case lately certified to the United States Supreme Court. *Yost* v. *Dallas County*, 35 Sup. Ct. 235.[1] The holder of county bonds, entitled to have a tax assessed, levied, and collected on his behalf, had recovered an uncollectible judgment,[2] but, although none but ministerial acts were required to raise the tax,[3] enforcement by the statutory remedy "by man-

[17] This is stated in TIFFANY, REAL PROPERTY, § 197, and extended also to "other persons." None of the cases cited, however, are in point.

[18] No wells had been sunk at the time the husband conveyed to the defendant. The dower tenant is entitled to operate only the mines or wells that were opened in the husband's lifetime. Stoughton *v.* Leigh, 1 Taunt. 402; Coates *v.* Cheever, 1 Cow. 460. The defendant, therefore, by opening wells was doing that which alone gave the wife any valuable interest in the deposits. Nor did it appear that the wells which the defendant had already opened were being used in any but a normal way.

[19] See cases in notes 12 and 16 *supra*.

[20] The South Carolina case, *supra*, note 4, seems to limit its decision to cases of equitable waste. Furthermore, instead of enjoining waste as to one third of the estate, it permitted waste up to the present value of inchoate dower as figured on expectancy tables by the rule suggested in Jackson *v.* Edwards, 7 Paige (N. Y.) 386, 408. As this value would be less, — probably much less, — than one third of the estate, this anomalous further limitation on the wife's rights seems indefensible.

[1] The case is stated with greater detail in this issue of the REVIEW, p. 640. The opinion of the court was delivered by Holmes, J. McKenna, J., and Pitney, J., dissented.

[2] This was the proper procedure. The validity and extent of the claim should be determined by judgment, and such judgment must be found incapable of satisfaction, before attempting the remedy by mandamus. See Von Hoffman *v.* City of Quincy, 4 Wall. (U. S.) 535; City of Galena *v.* Amy, 5 Wall. (U. S.). 705; Riggs *v.* Johnson County, 6 Wall. (U. S.) 166, 193; Walkley *v.* City of Muscatine, 6 Wall. (U. S.) 481.

[3] As to what is a ministerial act, see TAPPING, MANDAMUS, 171 *et seq.*; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1489. Kimberlin *v.* Commission to Five Civilized Tribes, 104 Fed. 653; Riverside City *v.* San Bernardino County, 134 Cal. 517, 66 Pac. 788; Rice, etc., Co. *v.* Worcester, 130 Mass. 575; Hull *v.* Oneida County, 19 Johns. (N. Y.) 259; Friel *v.* McAdoo, 181 N. Y. 558.

damus or otherwise" in the county circuit court [4] to command the appropriate taxing officers to act was not successful owing to resignation or evasion of service. Accordingly, the plaintiff asked that the federal court in equity appoint a commissioner or receiver to collect the tax. It had been found as a conclusion of law that "the plaintiff is utterly remediless at law." [5] The Supreme Court denied jurisdiction in the absence of authorizing statute, and was clearly governed by previous decisions of its own.[6]

It should be noted that theoretically further legal weapons were available to the plaintiff. Mere refusal to comply could not render the proceedings futile.[7] Neither could resignation, as mandamus would lie against the electing or appointing power to fill the vacancy.[8] Should this successor decline to serve, mandamus again would lie to compel acceptance of the office.[9] Throughout these proceedings at law it will be observed that the court would not be administering the tax, but the officials themselves, whom the court would be holding to the proper performance of their duties. Nevertheless, mandamus might be an arduous and impracticable, and, in that sense, an "inadequate," legal remedy.[10] It does not, however, follow that equity of its own volition may concoct a new and more satisfactory one of its own.[11] The subject must come within one of the heads of equity jurisdiction, — an equitable right or interest must be found.[12] Thus, equity will not relieve against noncompliance with an undoubted condition precedent [13] nor against the accidental failure to make a promised testamentary disposition.[14] Con-

[4] Mo. R. S. 1909, § 11417, provides, "No other tax for any purpose shall be assessed, levied, or collected except under the following limitations and conditions," and thereupon sets forth a procedure to obtain an order for the tax in the county circuit court which "shall enforce such order by mandamus or otherwise."

[5] It seems proper to observe that, strictly speaking, the remedy at law by mandamus cannot be made inadequate by mere refusal to comply with the alternative writ, for a peremptory writ would then issue, potentially enforceable by the entire *posse comitatus* of the state.

[6] Rees *v.* City of Watertown, 19 Wall. (U. S.) 107, 116; Heine *v.* Levee Commissioners, 19 Wall. (U. S.) 655, 661; Barkley *v.* Levee Commissioners, 93 U. S. 258; Meriwether *v.* Garrett, 102 U. S. 472, 501; Thompson *v.* Allen County, 115 U. S. 550, 558.

[7] See n. 5, *supra*.

[8] Election: Rex *v.* Mayor of Cambridge, 4 Burr. 2008; Rex *v.* Mayor of Abington, 1 Ld. Raym. 561; People *v.* Fairbury, 51 Ill. 149; State *ex rel.* McGregor *v.* Young, 6 S. D. 406. See TAPPING, MANDAMUS, 179 *et seq.*; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., §§ 1495–6.

Appointment: Rex *v.* Milverton, 3 A. & E. 284; The King *v.* Horton, 1 T. R. 374; *cf.* Lamb *v.* Lynd, 44 Pa. St. 336. See TAPPING, MANDAMUS, 63, 70, 89, 205; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1497.

[9] See 1 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 415; 4 *id.*, § 1498. City of London *v.* Vanacker, 1 Ld. Raym. 496; The King *v.* Bower, 2 Dowl. & R. 842; People *ex rel.* German Ins. Co. *v.* Williams, 145 Ill. 573, 33 N. E. 849. Any argument to the contrary that in this country man seeks the office, and not office the man, it is submitted, is untenable.

[10] It is easy to conceive that the remedy might have been insufficient from the outset, and, in that sense, truly "inadequate."

[11] See 1 STORY, EQUITY JURISPRUDENCE, 13 ed., §§ 60–1; 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., §§ 132–3; Rees *v.* City of Watertown, *supra*, p. 121; Heine *v.* Levee Commissioners, *supra*, p. 660.

[12] 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 133.

[13] Popham *v.* Bampfeild, 1 Vern. 79, 83; Lord Falkland *v.* Bertie, 2 Vern. 333.

[14] Whitton *v.* Russell, 1 Atk. 448.

sequently, here, private property not being liable for the debts of the county,[15] the requisite equitable interest is not apparent.[16]

But even if equity jurisdiction might be invoked upon one of the usual grounds or solely because of inadequacy of the legal remedy, there are other obstacles in the way of relief. "The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature." [17] However unjust or inappropriate the existing remedies, for the judiciary to undertake its exercise unbidden would be sheer usurpation.[18] Should there be found, however, such a statutory authorization by the state under whose authority the bonds were issued, there would, of course, be no objection to judicial action. But the Supreme Court has never declared more than one statute to contain such an invitation.[19] It is also fundamental that the sovereign can be sued only by consent.[20] To be sure, if a claim against a municipal corporation be accompanied in its inception by a legislative enjoinder that the debtor meet the obligation by tax, that mandate, as a subsisting remedy coeval with the agreement, becomes virtually irrevocable in relation to this

---

[15] It is only in the New England states that a private citizen's property may be levied on to satisfy a debt of the municipality. Hawkes *v.* The Inhabitants of the County of Kennebeck, 7 Mass. 461, 463; Chase *v.* Merrimack Bank, 19 Pick. (Mass.) 564; Eames *v.* Savage, 77 Me. 212; Beardsley *v.* Smith, 16 Conn. 368; Rees *v.* City of Watertown, *supra*, p. 122. See 3 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 992; 4 *id.*, §§ 1506 n., 1507 n., 1639 n. The point presented by the principal case, therefore, would not arise in those jurisdictions.

[16] It is appreciated that a court has ordered the appointment of a commissioner under circumstances analogous to those of the principal case. See Welch *v.* Ste. Genevieve, 1 Dill. (U. S.) 130, 29 Fed. Decis. 608; city trustee of drainage fund: Wilder *v.* City of New Orleans, 67 Fed. 567. In Garrett *v.* City of Memphis, 5 Fed. 860, the court would have preferred such a result, but was governed by the United States Supreme Court view expressed in Meriwether *v.* Garrett, *supra*. See also 23 HARV. L. REV. 647 for an argument in favor of equitable relief.

But in Wadley *v.* Lancaster, 122 Ga. 354, 52 S. E. 335, a promissory note was given by a municipality for property purchased by it. The indorsee of the note was not allowed to have a receiver appointed to take possession of, and sell, the property. See 5 MCQUILLIN, MUNICIPAL CORPORATIONS, § 2239.

[17] Waite, C. J., in Meriwether *v.* Garrett, *supra*, 501. This enunciation of the United States Supreme Court may need further explanation. See 1 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 595 n. But it nevertheless constitutes a most accurate text of what has been the attitude of that tribunal when confronted by an appeal to the courts to order an assertion of the taxing power. See Rees *v.* City of Watertown, *supra*, p. 116; Heine *v.* Levee Commissioners, *supra*, p. 661; Thompson *v.* Allen County, *supra*, p. 558.

[18] HIGH, RECEIVERS, 4 ed., § 403 *a*.

[19] Supervisors *v.* Rogers, 7 Wall. (U. S.) 175. An Iowa statute contained the provision that "the court may . . . direct that the act required to be done may be done by the plaintiff, or some other person appointed by the court." A marshal was appointed commissioner to levy a county tax to pay bonds where the board of supervisors failed to do so. Of this case, Bradley, J., in Barkley *v.* Commissioners, *supra*, 265, said, "But we have never gone beyond this case, which depended on the special law referred to." The decision in Supervisors *v.* Rogers, in the light of the subsequent decisions of Rees *v.* City of Watertown, *supra*, and Heine *v.* Levee Commissioners, *supra*, is criticised in 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 2699 n.

For a similar state decision, see State *v.* Middle Kittitas Irr. Dist., 56 Wash. 488, 106 Pac. 203.

[20] See cases *supra*, n. 2 and *infra*, n. 21.

Moreover, the prescribed procedure for raising the tax must be closely complied with to render the tax valid. City of Kansas *v.* Hannibal & St. Joseph R. Co., 81 Mo. 285; St. Louis & San Francisco Ry. Co. *v.* Apperson, 97 Mo. 300.

transaction, by force of the contract clause of the Constitution.[21] Yet only those rights conferred by a state at the time of contracting are preserved, and these are no broader than the state has conceded.[22] Here the paramount authority had given the creditor the undoubted, but not unrestricted, right to have the county circuit court enforce its order "by mandamus or otherwise." This is construed as conceding power only to order the proper officials to levy taxes,[23] and it might also be construed as giving consent to be proceeded against solely in the county court. Although where statute gives "a court" authority to collect a tax, federal courts have not hesitated to act,[24] nevertheless, a clearly expressed restriction confining the remedy against the sovereign to a state court might furnish another insuperable obstacle to federal jurisdiction in a case like the one in question.[25]

THE RELATIONAL DUTY OF THE PUBLIC SERVICE COMPANY TO ITS PUBLIC. — In a recent New York decision, recovery was refused a traveller on a railroad because there was no contract of carriage upon which to base a suit. *Robinson* v. *New York, N. H. & H. R. Co.*, 150 N. Y. Supp. 925 (App. Div.).[1] The decision raises the question of whether the obligation of the public service company to its public is based on contract or on a relation between the parties because of which the law imposes certain duties upon them. Sir Henry Maine in the middle of the last century wrote that the society of his day was chiefly to be distinguished from that of the previous generation by the largeness of the sphere occupied in it by the law of contract as opposed to that of status.[2] But Professor Pound has shown that the law of to-day is abandoning this nineteenth-century idea of the supremacy of contract and is, instead, further developing the older conception which goes back for its source to the Year Books.[3] In no field of the law has there been more striking

[21] THE CONSTITUTION, Art. I, sec. 10, cl. 1. Von Hoffman *v.* City of Quincy, *supra*. See Bronson *v.* Kinzie, 1 How. (U. S.) 311, 317; Edwards *v.* Kearzey, 96 U. S. 595, 607; Louisiana *v.* New Orleans, 102 U. S. 203, 206; Mobile *v.* Watson, 116 U. S. 289; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 414–5.

[22] See n. 20, *supra*.

[23] The statute in question was originally passed in 1879, and came before the Supreme Court in Seibert *v.* Lewis, 122 U. S. 284, 291, 298. See cases *supra*, n. 20.

[24] See Supervisors *v.* Rogers, *supra;* Stansell *v.* Levee Board of Mississippi, Dist. No. 1, 13 Fed. 846; Campbellsville Lumber Co. *v.* Hubbert, 112 Fed. 718, 721.

[25] In the principal case, however, mandamus seems to have issued from the federal district court prior to the present suit.

[1] For a statement of the case, see RECENT CASES, p. 626.

[2] MAINE, ANCIENT LAW, 4 ed., ch. 9.

[3] POUND, A FEUDAL PRINCIPLE IN MODERN LAW, 25 INTERN. J. OF ETHICS, No. 1. "The Roman idea of a legal transaction which the nineteenth century sought to apply to all possible situations, was regarded as the legal institution of the maturity of law. But the conception of a legal transaction regards individuals only. In the pioneer agricultural societies of nineteenth century America such a conception sufficed. In the industrial and urban society of to-day, classes and groups and relations must be taken account of no less than individuals. Happily the nineteenth century did not lose for us the contribution of the feudal law to our legal tradition. In its idea of relation, in the characteristic common law mode of treating legal problems which it derived from the analogy of the incidents of feudal tenure we have a legal institution of capital importance."